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Aurora World, Inc.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AURORA WORLD, INC.,

Plaintiff,

vs.

TY, INC.,

Defendants.

CASE NO. CV09-8463 MMM (Ex)

**DECLARATION OF MICHAEL
KESSLER IN SUPPORT OF
AURORA WORLD, INC.'S MOTION
FOR PRELIMINARY INJUNCTION**

[Filed concurrently with Notice of Motion and
Motion for Preliminary Injunction;
Memorandum of Points and Authorities
Declarations of Monica Fitzhugh and Wendy M.
Mantell, [Proposed] Injunction]

Date: TBD

Time: TBD

Courtroom: 780

Judge: Hon. Margaret M. Morrow

DECLARATION OF MICHAEL KESSLER

I, Michael Kessler, declare as follows:

1. I am the Senior Vice President, Sales, at Aurora World, Inc. ("Aurora World"). I submit this declaration in support of Aurora World's Motion for Preliminary Injunction. I have personal knowledge of the following facts, and if called to testify in this action, could and would testify as to the truth of such facts.

2. Aurora World is one of the world's leading companies for high-end, soft toy designs in the global gift industry.

3. Aurora World manufactures and sells a line of plush toys resembling animal characters based on its brand, YooHoo & Friends.

4. Aurora World has promoted its YooHoo & Friends brand by appearing at trade shows, including for example the Atlanta Gift Show, the Los Angeles Gift Show, the Chicago Gift Show, the New York International Gift Fair, and the Toy Fair held at the Jacob Javitz Center in New York, New York. Aurora World also advertises its YooHoo & Friends products in trade magazines and on its promotional website, located at www.yoohoofriends.com. Attached hereto as **Exhibit A** are examples of Aurora World's promotional marketing and advertising. Attached hereto as **Exhibit B** are printouts from Aurora World's YooHoo & Friends website, located at www.yoohoofriends.com.

5. Aurora World spent approximately \$225,000 on United States advertising and marketing expenditures for the YooHoo & Friends brand from 2007 through July 2009.

6. Aurora World spent approximately \$274,176 on worldwide advertising and marketing expenditures not including the United States for the YooHoo & Friends brand from 2008 through July 2009.

7. As of July 2009, Aurora World had spent \$251,646 building its promotional website, located at www.yoohoofriends.com.

1 8. As of July 2009, Aurora World International had spent approximately
2 \$669,000 creating the YooHoo & Friends animation series, which is currently airing in
3 several international markets and is planned for the United States market as well.

4 9. As of November 2009, retail sales of Aurora World's YooHoo & Friends
5 products totaled over \$4.0 million for the 2009 year. 2008 retail sales of Aurora
6 World's YooHoo & Friends products totaled over \$3.0 million.

7 10. Aurora World has partnered with Claire's Stores, Inc. to provide Aurora
8 World's YooHoo & Friends products in addition to custom YooHoo & Friends
9 characters that are exclusively sold at Claire's stores worldwide. Claire's Stores, Inc. is
10 one of the world's largest gift and specialty store retailers, and is among Aurora World's
11 most significant customers. Attached hereto as **Exhibit C** are printouts showing the
12 YooHoo & Friends characters as they have been featured on Claire's website, located at
13 www.claire.com.

14 11. Aurora World also markets and sells its YooHoo & Friends plush animals
15 and other products to zoos worldwide, which is Aurora World's second largest account
16 type, second only to card and gift stores.

17 12. Aurora World also markets and sells its YooHoo & Friends characters to
18 foreign and domestic distributors, toy stores, department stores, party stores, airport and
19 newsstand shops, amusement parks, hotel gift shops and restaurants, hospital gift shops
20 and grocery and drug stores.

21 13. Ty is one of Aurora World's direct competitors in the plush toy market. I
22 am informed and believe that some time in 2009, Ty released a line of animal plush
23 characters called the "Beanie Boos." The Beanie Boos were first released in the United
24 Kingdom, and recently have been offered for sale in the United States. Attached hereto
25 as **Exhibit D** is a sale sheet from October 2009 "introducing" nine different Beanie Boo
26 characters and images of Ty's Beanie Boo retail displays.

27 14. On October 2, 2009, I received an email from Bev Silvey, a manufacturers
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1 sales representative and owner of a company called Bee Marketing. Ms. Silvey is an
2 independent contractor for Aurora World, and our sales representative for the North
3 Carolina and Myrtle Beach areas. Ms. Silvey's email forwarded me an email from one
4 of her customers. Her customer noted that Ty's Beanie Boos are a "total rip off" of
5 YooHoo & Friends. Attached hereto as **Exhibit E** is a true and correct copy of the
6 email I received from Ms. Silvey.

7 15. On November 13, 2009, Sean Hellenbrand, Aurora World's Director of
8 Sales who reports directly to me, received an email from one of our customers, Kathryn
9 Dupasquier, Manager of retail operations for the Calgary Zoo. Ms. Dupasquier asked if
10 Aurora World makes the Beanie Boos for Ty. Attached hereto as **Exhibit F** is a true
11 and correct copy of the email Mr. Hellenbrand received.

12 16. On October 10, Aurora World received an email from Ty collectors named
13 Leon and Sondra. Leon and Sondra note that they publish a website for Ty collectors
14 and that the writer was "immediately struck by the similarity between your YooHoo's
15 and the Ty Boos." The writer then states that she "purchased a few of the YooHoos to
16 compare brands and the similarity between Ty's and Aurora's lemurs goes beyond mere
17 coincidence." The writer asks if there is a cross-licensing agreement between Ty and
18 Aurora. Attached hereto as **Exhibit G** is a true and correct copy of the email received
19 by Aurora World, in addition to pages from the website
20 <http://leonandsondra.com/albums/Beanie/boos.htm> noting that the Beanie Boos "look
21 similar to YooHoos."

22 17. The holiday season is an important season for plush toy companies because
23 many retail customers base their future orders for the coming year on how well items
24 fare during holiday sales.

25 18. Aurora World is being harmed by Ty's manufacture and sale of the Beanie
26 Boos because Ty, which holds a significantly larger percentage of the toy market than
27 Aurora World in the United States, is trying to crowd out the YooHoo & Friends
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1 products with its Beanie Boos and use its marketing clout to essentially drown out
2 Aurora World's marketing efforts. Aurora World also is being harmed by the confusion
3 that is being created with respect to YooHoo & Friends and Beanie Boos in the minds of
4 the public. If Ty is permitted to continue to sell its Beanie Boo products, therefore, I
5 believe that it will ultimately lead to a decrease in Aurora World's sales of the YooHoo
6 & Friends products.

7
8 I declare under penalty of perjury under the laws of the United States of America
9 that the foregoing is true and correct.

10 Executed on November 18, 2009 in PICO RIVERA, CA.

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12 
13 Michael Kessler
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PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES:**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **2450 Colorado Avenue, Suite 400E, Santa Monica, CA 90404.**

On November 19, 2009, I served copies of **DECLARATION OF MICHAEL KESSLER IN SUPPORT OF AURORA WORLD, INC.'S MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

DONNA M SNOPEK
280 CHESTNUT AVE.
WESTMONT, IL 60559

James P. White
Husch Blackwell Sanders Welsh & Katz,
LLP
120 South Riverside Plaza, Suite 2200
Chicago, IL 60606-3912

☒ **(BY ELECTRONIC MAIL)**

On the below date prior to 5:00 p.m. PST, I transmitted the foregoing document(s) by electronic mail, and the transmission was reported as complete and without error. A true and correct copy of the electronic transmission is attached to this declaration. This method of service was made pursuant to the agreement of counsel.

☒ **(BY PERSONAL SERVICE)**

I caused to be delivered such envelope by hand to the addressee noted above. Executed on November 19, 2009, at Santa Monica, California.

☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 19, 2009, at Santa Monica, California.


ALMA R. RINCON